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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1411

REBA LUNOW,
Petitioner,

vs.

FAIRCHANCE LUMBER COMPANY, A CORPORATION; ROCKWELL-STANDARD CORPORATION, A CORPORATION; UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; ALLEN & HOSHALL, A CO-PARTNERSHIP, Composed of Lorin B. Allen and Robert H. Hoshall,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT

Petitioner, Reba Lunow, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered on February 9, 1968, affirming the trial court's judgment sustaining the respondents' motion to dismiss the Petitioner's complaint. No petition for rehearing was filed. A motion to stay the mandate has been granted.

OPINIONS BELOW

The judgment of the trial court is not officially reported and is printed in the Appendix A to this petition. The opinion of the Court of Appeals is not yet officially reported and is printed in Appendix B to this petition.

JURISDICTION

Jurisdiction of this court is invoked under Title 28, U.S.C.A., Section 1254 (1).

The denial of the constitutional guarantees of the Fifth and Fourteenth Amendments were raised in the Complaint in the Trial Court, and in the Court of Appeals.

FEDERAL STATUTE INVOLVED

Title 42, U.S.C., Sec. 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

OKLAHOMA STATUTES INVOLVED

Title 32, O.S.A., Section 1.

Mutual Obligations.

Husband and wife contract towards each other obligations of mutual respect, fidelity and support.

Title 32, O.S.A., Section 3.

Duty to Support.

The husband must support himself and his wife out of the community property or out of his separate property or by his labor. The wife must support the husband when he has not deserted her out of the community property or out of her separate property when he has no community or separate property and he is unable from infirmity to support himself.

Title 32, O.S.A., Section 4.

Separate Property.

Except as mentioned in the preceding section 1, neither husband nor wife has any interest in the separate property of the other, but neither can be excluded from the other's dwelling.

Title 32, O.S.A. Section 15.

Rights of Married Women.

Women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone. Provided that this Chapter shall not confer upon the wife a right to vote or hold office, except as is otherwise provided by law.

CONSTITUTION OF OKLAHOMA

Article 2, Section 7:

> "No person shall be deprived of * * * property, without due process of law."

Article 4, Section 1:

> "The powers of the government of the State of Oklahoma shall be divided in three separate departments; The legislative, executive, and judicial; * * * and neither shall exercise the powers belonging to either of the others * * *."

CONSTITUTION OF THE UNITED STATES

Fifth Amendment:

> "* * * No person shall be deprived of life, liberty or property without due process of law."

Fourteenth Amendment:

> "Section 1. * * * Nor shall any state—deny to any person within its jurisdiction equal protection of the laws."

QUESTIONS PRESENTED

1. The decision of the Trial Court and the Court of Appeals based on the decision of the Supreme Court of Oklahoma are violative of the Constitutional rights of Petitioner, Reba Lunow guaranteed to her by the 5th and 14th Amendments.

a. The denial of the right of a married woman to an action for her damages and loss of consortium due to crippling personal injuries to her husband, caused by the negligent acts of third parties, where the same right is

granted to a man, is a denial of the equal protection of the law.

b. The denial of the petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes a denial of due process of law as to the wife.

2. The decision of the Court of Appeal and United States District Court denies the petitioner her constitutional right to equal protection and due process of law and constitutes an unreasonable and invidious discrimination.

STATEMENT OF THE CASE

The complaint was filed on March 25, 1966 by Reba Lunow, wife of William Henry (Bill) Lunow, an incompetent, to recover her damages for loss of consortium and for breach of and interference with her marriage contract, when her husband of twenty-five years was permanently and totally disabled from injuries caused by the gross negligence of the Respondents.

William Henry (Bill) Lunow was employed by Western Steel Erectors and was working on the roof of the building of respondent, Rockwell-Standard in Oklahoma County which was being constructed by Respondent, Fairchance Lumber Company. Respondent, United States Fidelity and Guaranty had insurance contracts on other respondents and had the right of safety inspections and had made some inspections. Respondents, Allen and Hoshall were the architects. They were independent contractors and not agents of employer.

The complaint and amendment allege the destruction by Respondents of the marriage contract of Petitioner and her husband by injuring him, the denial of her constitu-

tional right to equal protection of the laws and her right to sue for damages. There is no statute granting the husband the right to sue for loss of consortium of his wife and no statute denying that right to the wife.

REASONS FOR GRANTING THE WRIT

1. Granting right of action for loss of consortium to a husband and withholding it from the wife, by opinion of the Supreme Court of Oklahoma in *Howard* v. *Verdigris Valley Electric*, 207 P.2d 784, constitutes a denial of the constitutional guarantees of equal protection and due process amendments to the constitution.

2. The denial of Petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes an unwarranted and invidious discrimination.

3. The Court of Appeals, Tenth Circuit affirmed the Trial Court's decision dismissing this case, however, did so on ground and for a reason not decided or passed upon by the Trial Court. Two different reasons have been given for dismissing the Petitioner's complaint.

(a) The Trial Court dismissed the complaint for the reason the denial of a right to an action for loss of consortium by a wife does not violate the constitutional guarantees.

(b) The Court of Appeals Tenth Circuit affirmed the trial court on the grounds the Workmen's Compensation Act of Oklahoma spreads the umbrella of immunity over all of the Respondents, and refused to decide the constitutional questions.

4. The Court of Appeals has decided a procedural question which is in conflict with the decisions of this

court, to-wit, The Court of Appeals has decided that on a motion to dismiss the court may determine without benefit of affidavits or depositions the relationship between parties, that is, whether or not the relationship of agency or independent contractor exists. That such a decision is a denial of due process of law and deprives a party of the right to a trial by jury.

BRIEF OF AUTHORITIES AND ARGUMENT

1. Granting a right of action for loss of consortium to a husband, but withholding it from the wife, by opinion of the Supreme Court of Oklahoma in Howard v. Verdigris Valley Electric, 207 P.2d 784, constitutes a denial of the constitutional guarantees of equal protection and due process amendments to the constitution.

Loss of consortium is a cause of action which may be validly maintained by a wife when her husband is negligently injured by defendant.

We realize that recent cases are in conflict with the present law of the State of Oklahoma. These cases are cited for two specific reasons:

1. To show the recent trend in the law; and,
2. To show that courts have refused the continued denial of recovery to the wife as unfair and not being supported in reason or fact, a reason which in our opinion is far less valid than one based on denial of constitutional guarantees.

Title 32, O.S.A., Section 15 confers on the wife the right to sue for injury to her property. A wife can sue on the basis of destruction and interference with her marriage contract. Petitioner should be granted the right to be heard and present this case to the Court.

In Oklahoma each spouse has separate and equal interest in all the rights and privileges which emanate from the marriage contract—in the consortium of his or her spouse. There is no logical reason why each spouse should not have an equal and independent cause of action for loss of consortium through negligence, *Carey* v. *Foster*, 345 F.2d 772, C.A. 4th, 1965.

There should be no distinction in Oklahoma between an action based on negligence and those brought for alienation of affections. The injury sustained by the wife is the same—it matters not whether it was intentional or through negligence.

In Oklahoma, women (wives) may sue and recover for alienation of affections, slander, libel, damages caused by any act, may vote, hold public office, and have any other right or protection their husbands have, except the Supreme Court of Oklahoma held that a wife could not sue for loss of consortium of her husband. This is judge-made law that conflicts with Title 32, O.S.A., Section 15 and the Amendments of the Constitution of the United States and denies due process and equal protection of the laws to women because they are women. 1

In *Moore* v. *Moore*, 158 Pac. 578, the Oklahoma Court held:

> "Under the laws of Oklahoma, a woman, though married, retains her legal existence and personality, and may sue in the courts in her own name for the protection or redress of injury sustained to her reputation, person, property, or natural rights, the same as a man can do."

based upon *Fiedeer* v. *Fiedeer*, 140 Pac. 1022, wherein the Supreme Court of Oklahoma held:

1. An additional reason for reviewing the decision is based upon the fact that in Oklahoma and 37 other states, a wife would be entitled to a divorce upon the grounds of arbitrary refusal of consortium under mental or physical cruelty portion of the divorce statute. See 12 Okla.Stat. Ann. 1271

> "It is the policy of our Constitution and statutes to open the doors of the courts of justice to every person without distinction or discrimination for redress of wrongs and reparation for injuries; and, under our Constitution and statutes, a married woman may maintain an action for injuries to either her natural or statutory rights the same as though she were a feme sole * * *."

The answer to the assertion that no statute gives a wife a cause of action, is that while it may be conceded that the Emancipation Statute does not grant the wife a new cause of action it does not prevent the wife from having a legal protected interest. In allowing a wife to recover for a negligent wrong inflicted by her husband, the Oklahoma Court in *Courtney* v. *Courtney*, 184 Okla. 395, 400, 87 P.2d 660, 665 (1938) said:

> "It is our view that by reason of the statutes just mentioned, it was unnecessary for the legislature by section 1665, O.S. 1931 (32 Okl. Stat. 815 (1941)), to allow the wife a cause of action in express terms—she, like all ordinary persons, had already been granted that by our Constitution and previous statutes. It was necessary only to free the married woman of her procedural disability in order that she might exercise the natural rights of an ordinary person. . . ."

At page 666 the court continues:

> "Other evidence of the aim to free married women from their common law disabilities and to give effect to the modern and more enlightened conception of the marriage status is found in the fact that in this state as in North Dakota from whence came our married women's statutes, a wife is not under the legal disabilities still obtaining in many of the states whose courts adhere to the majority view." The opinion continues with quotes from *Helvie* v. *Hoover*, 11 Okla. 687, 69 Pac. 958.

If the wife has all the rights of an ordinary person then she had the substantive right to her husband's consortium. It is immaterial whether the State of Oklahoma has acted solely through its judicial branch, since, whether legislative or judicial, it is still the application of the state power which must be scrutinized to determine the violation of constitutional rights. *NAACP* v. *Alabama*, 377 U.S. 288, 12 L.Ed.2d 325, 84 S.Ct. 1302.

The Petitioner is not asserting a new right. The recovery in the husband's instance and not in the wife's is a violation of her rights under the Oklahoma statutes and the 5th and 14th Amendments to the Constitution.

2. The denial of Petitioner's right to an action for loss of consortium where the same right is granted to a man constitutes an unwarranted and invidious discrimination.

The rights which the Petitioner is asserting in this action are entirely separate from the grounds of recovery asserted by the husband in his action against the Respondents. Just as in the husband's action for loss of consortium, the wife cannot recover for any damages for which the husband might have recovered (or his personal representative in the case of wrongful death); she can recover for those injuries which were sustained by her, and being personal to her, for which the husband could not have recovered in his action. Admitted that the injury is one that is difficult to measure in pecuniary terms, it undoubtedly is a real injury, and can certainly be as accurately measured as the injuries in a case where the husband is suing for loss of consortium. The reasoning, that the husband has already recovered, is based upon the false idea that loss of services is the only or main element of consortium. Moreover, it is argued that since the husband has already recovered damages for his being un-

able to support the wife, then she has no cause of action for the so-called sentimental elements of consortium. Oklahoma, however, allows recovery for injury to the sentimental elements of consortium alone. Oklahoma has adopted the following definition of loss of consortium: "Loss by either husband or wife of rights to the person, affection, society, assistance, aid, fellowship, companionship, cooperation, or comfort of the other constitutes a loss of consortium." *Overton* v. *Overton*, 246 Pac. 1095, 1907 (1926).

Let us view the marital rights of which the Petitioner was deprived and for which she may recover damages. From the definition of "consortium" heretofore adopted, these rights are personal and mental, including the society, the affection, and the companionship of the husband. The other, financial, including the right to be maintained and supported during her life in accordance with her rank and station, the right of co-operation, the right of assistance. These elements constitute more or less of a concrete and exact division of the whole that may be ascertained from facts and figures. Upon these elements there is a large measure of discretion with the jury.

When a comparable set of facts was submitted to the Federal District Court in *Owens* v. *Illinois Baking Co.*, 260 F.Supp. 820 (Mich. 1966), there the constitutional right prevailed. The State law was held to be unconstitutional and in violation of equal rights and due process.

In *Manning* v. *Jones*, (C.A. 8th, 1965) 349 F.2d 992, was a wife's action for loss of consortium resulting from injuries to her husband by negligence of defendant. Judgment was rendered for the plaintiff and defendant appealed; affirmed. Undisputed findings that physical

condition of plaintiff's husband resulted in his complete disability to engage in conjugal relations with his wife or be of comfort to her and left her with life devoid of all normal conjugal relations and otherwise barren of normal living, sufficed as basis for judgment awarding damages to plaintiff for loss of her separate right of consortium growing out of marriage contract. At page 996 the Court continued:

> "Defendant's counsel frankly conceded at oral argument that deprivation of sexual relations alone would suffice to justify the amount awarded." ($15,000.00).

The wife has a separate and independent right of action for loss of consortium for negligent injuries. *Sove* v. *Smith,* (C.A. 6th, 1962) 311 F.2d 5 (Reversing lower court); *Wright* v. *Schebler Co.,* 37 F.R.D. 319; *Dutton* v. *Hagletower,* 214 F.Supp. 298; *Karczewski* v. *Baltimore and Ohio Railroad Company,* 274 F.Supp. 169 (1967).

In *Montgomery* v. *Stephan,* 101 N.W.2d 227 (1960), plaintiff's husband suffered severe and permanent physical and mental injuries from an automobile collision caused by defendant's alleged negligence. In her declaration plaintiff sought a recovery for the loss of her husband's consortium caused by the collision. She asserted that she had been "deprived of her husband's society and comfort, of his aid and companionship and of normal conjugal affection." The trial court granted defendant's motion for dismissal of the declaration on the ground that a wife may not recover for loss of consortium caused by negligence.

On appeal, held, reversed and remanded. The court rejected the applicability of the overwhelming precedent on the grounds that they were "out of harmony with the

conditions of modern society" and constitutional provisions which have placed the wife of today on a legal par with her husband. Justice Talbot Smith in referring to a wife's cause of action for consortium stated (235):

> "The reasons for the old rule no longer obtaining, the rule falls with it. The obstacles to the wife's action were judge-invented, and they are herewith judge-destroyed."

The point considered is, that to apply what appears to be the present Oklahoma law, which gives the husband a cause of action for loss of consortium, but denies the same right to the wife, would deprive the wife of the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides:

> "Nor shall any state * * * deny to any person within its jurisdiction equal protection of the laws."

It is settled that the equal protection clause of the Fourteenth Amendment operates fully to include women within its protective scope. Discriminations against women as such are invalid. 16 Am.Jur.2d, Sec. 514, at page 899, citing *Carrithers* v. *Shelbyville*, 126 Ky. 769, 104 S.W. 744; *State ex rel. Wells* v. *Walker*, 326 Mo. 1233, 34 S.W.2d 124; and *Re Opinion of the Justices*, 303 Mass. 631, 22 N.E.2d 49, 123 A.L.R. 199.

That the equal protection clause affords comfort to women and this was made clear in the case of *Goesaert* v. *Cleary*, 335 U.S. 464, 69 S.Ct. 198, decided in the Supreme Court of the United States in 1948. As a part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed, but no female may be so licensed unless she be "the wife or daughter of the male owner," of a licensed liquor establishment. It was

argued that the classification as made by the Michigan statute deprived women of the equal protection of the laws as guaranteed by the Fourteenth Amendment. Justice Felix Frankfurter, writing for the majority of the Court, said at page 466:

> "* * * Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon states precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the Constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same."

No rational basis may be found for the distinction made by Oklahoma case law which is applied so as to give the husband a cause of action for the loss of consortium and at the same time deny an equivalent right to the wife. The inability of the wife to sue for a loss of consortium results not from the absence of a right, but from the previous state case law, in which the constitutional issue was not raised, nor mentioned, nor passed on. Yet Oklahoma courts held women are eligible to be jurors and that the word "men" in Sections 18 and 19 of Article 2 of the Constitution of Oklahoma included "women." See *In re House Bill No. 145*, in 237 P.2d 624 (Okla. 1951).

The Congress enacted the Civil Rights Act prohibiting discrimination between men and women in employment.

There has been a steady trend on the part of the courts of various states to recognize that the wife does have an action for loss of consortium because there is no longer any rational basis for granting the right to the husband and denying it to the wife. Many of these courts

have reached this position specifically on the basis that continued denial of recovery to the wife is unfair and cannot be supported in reason or fact.

Under the doctrine of *Erie* v. *Tompkins*, 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817, Federal Courts must follow the substantive law of the states in diversity cases, but where a Federal question is presented, the court looks to Federal law as interpreted by the United States Supreme Court.

When you look to Federal law, you find from *Hitaffer* v. *Argonne*, (D.C.) 183 F.2d 811, on down each time the Federal Courts have passed on this question of wife's right to sue for loss of consortium (when husband has the right also to sue) they have sustained the right of the wife also to sue.

The trial court applied the law of the forum even though it is in conflict with the Constitution and in addition was a tort for damages to the marriage contract of Petitioner.

In *Owens* v. *Illinois Baking Co.*, 260 F.Supp. 820 (Feb. 7, 1966, Mich.):

> "Denying wife right to sue for loss of consortium where right is granted to husband is violation of her right of equal protection of law under the 14th Amendment."

The Supreme Court has frequently sustained District Court jurisdiction under 28 U.S.C., Sec. 1343 (3) or its predecessors to entertain suits to redress deprivations of right secured against state infringement by the equal protection and due process clauses of the Fourteenth Amendment. *Douglas* v. *Jeannette*, 319 U.S. 157, 87 L.Ed. 1324, 63 S.Ct. 877.

The constitutional protection from discrimination which is violative of due process under the Fifth and Fourteenth Amendments, has not been raised by the litigants or passed upon by the courts, in the cited Oklahoma cases. This is a strong constitutional point raised in the Lunow case; where it has been raised, the Federal court has held that to deprive a wife of her right to recover for loss of consortium is unconstitutional. The Constitution has been to one generation a means of cementing the Union, to another a protectorate of burgeoning property, and to another a safeguard of basic human rights and equality before the law.

In *Criqui* v. *Blaw-Knox,* (10th 1963), 318 F.2d 811, this Court of Appeals' interpretation of the Kansas law did not pass on the denial of constitutional guarantees under the Fifth and Fourteenth Amendments because the Federal question was not alleged, presented, argued or involved in that case. The Federal Court has the power and duty to enforce basic civil constitutional rights which State courts are reluctant to protect and in recent years has pioneered in this area.

Law is not static, but is endowed with vitality and a capacity to grow. It never becomes permanently crystallized but changes and adjusts from time to time to new developments in social and economic life to meet the changing needs of a complex society.

Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the Federal judicial power defined in Article 3, Sec. 2 and so within the power of Congress to assign to the jurisdiction of District Courts. Congress has exercised that power in Title 28, U.S.C., Sec. 1343(3):

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person * * * to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *."

Title 42, U.S.C., Sec. 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress."

This section grants separate and distinct rights of action for denial of due process of law of equal protection of the law. *McShane* v. *Moldovan*, 172 F.2d 1016 (6th C.A.); *Ortega* v. *Ragen*, 216 F.2d 561 (7th C.A.), *cert. denied* 349 U.S. 940.

It is aptly stated in the case of *Clem* v. *Brown*, 207 N.E.2d 398 (Ohio), to recognize a husband's right to recover for loss of consortium without giving a wife an equivalent right to recover for negligent impairment of husband's consortium would be an unconstitutional denial to a wife of "equal protection of law."

Wives should have the same rights as husbands both under Oklahoma law and the same right not to be discriminated against under the Amendments to the Constitution of the United States.

The difficulty in asserting women's rights lies not in the limited reach of the Fourteenth Amendment, but in

the failure of the courts to isolate and analyze the discriminatory aspect of differential treatment based on sex.

Law, like society, is best judged by how it deals not with the strong but with the weak. The greatness of American justice is measured not by our commercial law, but by the extent to which legal aid has put justice within the reach of the poor and defenseless * * *.

The genius of the American Constitution is its capacity, through judicial interpretation, for growth and adaptation to changing conditions and human values. Courts have not yet fully realized that women's rights are a part of human rights; but the climate appears favorable to renewed judicial attacks on sex discrimination.

In *Novak* v. *K. C. Transit Co.*, 365 S.W.2d 539, Missouri has perhaps best exemplified the wife's loss in the following statement (quoting from another opinion):

> "The difficulty . . . is their failure to distinguish the injured husband's personal loss from the separate, distinct and legally recognized loss suffered by his wife. Take the case of a husband who suffers an incapacitating injury to his reproductive organs. In his personal injury suit it is clear that his damages are predicated upon *his* physical injury which precludes him from copulation, procreation, and an otherwise full enjoyment of his marital state. However, the wife's loss is just as real as it is distinct. She can no longer enjoy *her* legally sanctioned and morally proper privilege of copulation or procreation, and is otherwise deprived of *her rights,* not his."

Missouri courts feel that the problem of double recovery can be avoided by simple mathematics. This is done by delineating, accurately, the items properly includable in the husband's damages, then allowing a separate action by the wife in which she is permitted to

recover for the loss of only those elements of consortium which, under the facts of the particular case, represent separate and distinct losses to her.

It has been an uphill struggle for the married woman but there appears to be a definite trend in American courts which favors the wife's right to maintain an action for the loss of consortium when the husband's injury is the result of a stranger's negligent act. Those opposing this view now appear to have recognized that there is some injustice in their decisions.

The Oklahoma case law rule which held that a wife may not recover for the loss of consortium of her husband deprives the wife of her equal protection of the law, as provided in the 5th and 14th Amendments to the United States Constitution and constitutes an invidious discrimination. There can be no question that the judiciary has taken giant strides in the last two decades to insure the legal equality of all persons. The Congress has stressed this in the recent enactment of the Civil Rights Law. The law is changing, society is changing, and antiquated distinctions in both criminal and civil law which have for so many years deprived citizens of these constitutionally guaranteed equalities have fallen. The Respondents rely on the common law rights of women, when the wife was little more than a chattel. Any married man would be the first to admit that this condition no longer exists.

The interpretation by the trial court of the Oklahoma decisions denying the wife these rights is based on the theory that the wife had no action for loss of consortium at common law and that she can have no such right of action unless specifically conferred by statute. There is no Oklahoma statute authorizing the husband's right to sue. The right grows out of the marriage relation.

3. The Court of Appeals, Tenth Circuit, affirmed that Trial Court's decision dismissing this case, however, did so on ground and for a reason not decided or passed upon by the Trial Court. Two different reasons have been given for dismissing the Petitioner's complaint.

(a) The Trial Court dismissed the complaint for the reason the denial of a right to an action for loss of consortium by a wife does not violate the constitutional guarantees.

(b) The Court of Appeals, Tenth Circuit, affirmed the Trial Court on the grounds the Workman's Compensation Act of Oklahoma spreads the umbrella of immunity over all of the Respondents.

Matters not appearing in the record will not be considered by the Court of Appeals. *Brooks* v. *Woods*, (C.A. 9th) 181 F.2d 716; *McCullough Tool Co.* v. *Well Surveys, Inc.*, (C.A. 10) 1965, 343 F.2d 381, cert denied.

The Respondents are bound by the decision of the trial court, and reviewing court will refuse to consider question which is raised for the first time on appeal and was never presented to or passed upon by the trial court..

Petitioner and Respondents are bound by theories passed upon by the trial court and other theories cannot be raised or argued in the Court of Appeals if not passed upon by the trial court. *Gilby* v. *Travelers Ins. Co.*, (C.A. 8) 248 F.2d 794.

In the Lunow case the trial court in passing upon the motions to dismiss did not decide the "workman's compensation" question and the only legal question before this court is the constitutional question.

This case presents serious constitutional questions which in our opinion should be decided by this court. Many states have granted a wife the right to an action

for loss of consortium for negligent injuries to the husband. Several states including the District of Columbia have held that where Workman's Compensation Law or similar legislation applies assuming the woman has the right to an action for a loss of consortium such laws constitute an exclusive remedy against persons covered by the law, *Smithers and Co.* v. *Coles*, 242 F.2d 220.

In the case of *Hitaffer* v. *Argonne Co.*, 183 F.2d 811, the Court of Appeals in the District of Columbia decided this question in favor of the woman and this court denied certiorari. And in the latter case of *Smithers and Company, Inc.* v. *Coles*, 242 F.2d 220, same circuit, that court expressly overruled its prior decision in *Hitaffer* v. *Argonne*, supra. We respectfully submit that the constitutional questions involved regarding the right of a woman to sue for loss of consortium and whether or not the Workman's Compensation Law is exclusive as against persons covered by the act should be considered by this Court. All of the 50 states have Workman's Compensation Laws or similar legislation.

The Oklahoma Workman's Compensation Act was passed at a time when an action for loss of consortium was not granted to a woman for negligent injuries by third persons to her spouse. The Oklahoma Workman's Compensation has abrogated certain rights of the employee. The Court of Appeals, Tenth Circuit, has decided that even if the Petitioner has a right to an action for loss of consortium the Workman's Compensation Law of Oklahoma has abrogated this right. This we say is error.

The Oklahoma Supreme Court has consistently held that the purpose of the Oklahoma Compensation Law, Title 85, O.S.A., Section 1 et seq., is to compensate the injured person for loss of earning power from inability to

work and for a disability resulting in a loss of wage earning capacity. *U. S. Casualty Co. v. Steiger*, 66 P.2d 55; *Van Orman* v. *Robinson*, 300 Pac. 412.

This case presents two constitutional questions to this court which should be decided:

a. Is it a violation of constitutional guarantees to deprive a woman of an action for loss of consortium for injuries to her husband where the same right is granted to a man for injuries to his wife?

b. Assuming the woman has a right to an action for loss of consortium has the Court of Appeals, Tenth Circuit, denied the Petitioner her constitutional rights by holding in this case the Workman's Compensation Law abrogates a right to loss of consortium where by construction the compensation granted by the act is solely for loss of earning capacity?

4. The Court of Appeals has decided a procedural question which is in conflict with the decisions of this Court, to-wit, the Court of Appeals has decided that on a motion to dismiss the Court may determine without benefit of affidavits or depositions the relationship, between parties, that is, whether or not the relationship of agency or independent contractor exists. That such a decision is a denial of due process of law and deprives a party of the right to a trial by jury.

The Court of Appeals in its zeal to determine this case on grounds other than the constitutional question has committed error. The Court of Appeals in its opinion determined that Allen & Hoshall were the agents of Rockwell-Standard and therefore enjoyed the same immunity granted to Rockwell-Standard by Oklahoma Workman's Compensation Act. The procedural aspects of this case must be kept in mind, i.e., the case was before the Court

of Appeals from the trial court's order sustaining the respondents' motions to dismiss. In the complaint, the Petitioner states a claim against Allen & Hoshall engineers on grounds of negligence.

The Court of Appeals, Tenth Circuit, only had before it a motion to dismiss with several stipulations and proceeded to determine as a matter of law that Allen & Hoshall were the agents of Rockwell-Standard and therefore the doctrine of respondeat superior applied. This we say was error because the question of agency or independent contractor cannot be determined from the record in this case. The better rule is that if a constitutional question may be decided on facts (agency or independent contractor) then a motion to dismiss should be overruled; *Gibbs* v. *Buck*, 59 S.Ct. 725, 307 U.S. 66, 83 L.Ed. 1111. The action of the Court of Appeals is patently erroneous because it deprives a litigant of the right of trial by jury. *Simler* v. *Conner*, 83 S.Ct. 609 372 U.S. 221, 9 L.Ed.2d 691. It was a contract between Allen & Hoshall and Rockwell-Standard. This contract was made by Rockwell-Standard and Allen & Hoshall was either an independent contractor in its relation to Rockwell-Standard or was an agent, servant or employee of Rockwell-Standard. This is a question of fact at least until such time as the court with the facts before it determines as a matter of law that the relationship is one or the other.

There are no facts, depositions, interrogatories affidavits or statements in pleadings from which the Court of Appeals could ascertain as a matter of law the legal relationship between Allen & Hoshall and Rockwell-Standard Corporation—*Carss* v. *Outboard Marine Corp.*, (C.A. 5th, 1958) 252 F.2d 590. The concept of the Federal Rules dictates that pleadings are to facilitate a proper

decision on the merits and not provide a vehicle to deny a litigant his day in Court. *Conley* v. *Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the petition for a writ of certiorari should be granted.

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